OH TECK SOON

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, IPOH
AJAIB SINGH J
[CRIMINAL APPEAL NO. 261 OF 1982]
24 MARCH 1983

CRIMINAL LAW AND PROCEDURE: *Copyright - Accused charged for offences under the Copyright Act 1969 - Copies of video tapes - Magistrate discharged the appellant not amounting to an acquittal as prosecution was unable to proceed with the case - Material witness not served with subpoena - Appellant rearrested and recharged for the same offences - Preliminary objection by Counsel that the proceeding was a fresh one - Whether prosecution was out of time to institute further proceedings - Whether prosecution caught by the six months' period under s. 15(4) of the Copyright Act - Whether appellant should be acquitted and discharged - Whether ruling by Magistrate was on mere procedure - Whether there was right of appeal.*

This was an appeal against a ruling of the learned Magistrate upon a preliminary objection by learned Counsel for the accused in the proceedings under the Copyright Act 1969. On 16 July 1981 the police seized 286 copies of video tapes from the accused under a search warrant issued by a Magistrate under s. 15(4) of the Copyright Act 1969. The accused was arrested on the same day but without a warrant of arrest and charged in Court on 27 November 1981 on two counts under s. 15(1)(b) and (d) the second charge being in the alternative. After several postponements at the request of the prosecution, the accused was finally discharged not amounting to an acquittal on 14 September 1982 after the learned Magistrate had disallowed an application by the prosecution for a further postponement on the ground that a material witness had not been served with a subpoena.

The accused was rearrested under a warrant of arrest dated 26 October 1982 on the same day when the police had applied for a warrant of arrest, and charged in Court on 1 December 1982 on the same two charges preferred earlier relating to the same 286 copies of video tapes. Accused's Counsel raised preliminary objection and submitted that the second prosecution was a fresh one and by virtue of s. 15(4) of the Copyright Act the prosecution was out of time to institute further proceedings against the accused and applied that the accused be acquitted and discharged and that the tapes be returned to the accused. The learned Magistrate however overruled the preliminary objection as he was of the view that the second prosecution was in fact a continuation of the first one and as such it was not caught by the six months period under s. 15(4) of the Copyright Act.

Held:

[1] The intention of the legislature in enacting s. 15(4)(b) of the Copyright Act was that after the infringing copies are seized by the police under a search warrant issued by a Magistrate proceedings for any offence under s. 15(1) must be instituted within six months of the seizure.

[2] However, if no proceedings are instituted within the six months the copies have to be returned to the person from whom they were seized or to be dealt with in accordance with the provisions of s. 15(4) of the Copyright Act.

[3] The order of discharge of the accused by itself was no bar to the institution of further proceedings against the accused but any further proceedings had to be instituted within six months of the seizure of the tapes and these six months had already lapsed when the accused was arrested the second time.

[4] As the second proceedings were not instituted within the aforesaid six months the Magistrate's Court had no jurisdiction to take cognizance of the offences with which the accused was charged on the second occasion.

[5] The ruling by the learned Magistrate was not a ruling on mere procedure from which there would be no right of appeal. The ruling went to the very jurisdiction of the Magistrate's Court and as such an appeal was quite in order.

[6] In the exercise of the appellate jurisdiction as well as the revisionary powers of the High Court, the Court ordered that the accused be acquitted and discharged and that the video tapes be returned to him.

[Appeal allowed. Accused acquitted and discharged. Video tapes ordered to be returned to accused.]

Legislation referred to:
Copright Act 1969, s. 15(1), (1)(b), (d), (4), (4)(b)

For the appellant - Hira Singh
For the respondent - Mohd. Bazain Idris, DPP

JUDGMENT

Ajaib Singh J:

This was an appeal against a ruling made by the learned Magistrate upon a preliminary objection taken by learned Counsel for the accused. The brief history of this case is as follows. On 16 July 1981 the police seized 286 copies of video tapes from the accused under a search warrant issued by a Magistrate under s. 15(4) of the Copyright Act 1969. The accused was arrested on the same day and charged in Court on 27 November 1981 on two counts under s. 15(1)(b) and (d) the second charge being in the alternative. Thereafter the prosecution was unable to proceed with the case for some reason or other and after several postponements the case came up for hearing on 14 September 1982 when the learned Magistrate discharged the accused not amounting to an acquittal after he had disallowed an application by the prosecution for a further postponement. The prosecution had sought the postponement on the ground that a material witness had not been served with a subpoena.

On 26 October 1982 the police applied for a warrant of arrest the accused by laying a written information whereupon the learned Magistrate issued a warrant of arrest on the same day. The first arrest on 16 July 1981 was made without a warrant but this was quite in order as the accused was being charged with seizable offences. In due course the accused was arrested on the warrant of arrest and produced before the learned Magistrate on 1 December 1982. The same two charges were preferred against the accused relating to the same 286 copies of video tapes which the police had seized on 16 July 1981. It was at this stage that learned Counsel for the accused raised the preliminary objection. He submitted that when the accused was discharged not amounting to an acquittal on 14 September 1982 the proceedings came to an end. The present prosecution was a fresh one and by virtue of s. 15(4) of the Copyright Act the prosecution was out of time to institute further proceedings against the accused. Learned Counsel asked that the accused be acquitted and discharged and that the tapes be returned to the accused.

The learned Magistrate however was of the view that the second prosecution was in fact a continuation of the first one and as such it was not caught by the six months' period under s. 15(4) of the Copyright Act. He accordingly overruled the preliminary objection.

Section 15(4) of the Copyright Act reads as follows -

> (4) If information is given upon oath to any Magistrate that there is reasonable cause for suspecting that there are in any house, premises, vessel or other place any infringing copies (or any contrivance used or intended to be used for making infringing copies) or capable of being used for the purpose of making infringing copies by means of or in relation to which any offence under subsection (1) of this section has been committed, he may issue a warrant under his hand by virtue of which any police officer named or referred to in the warrant may enter the house, premises, vessel or other place at any reasonable time by day and search for and seize any such copy or contrivance; and if a copy or contrivance is seized under this sub-section in connection with an offence and -
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> (a) in proceedings brought under this section in connection with the offence no order is made under sub-section (2) of this section as to the copy or contrivance; or
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> (b) no such proceedings are instituted within six months of the seizure,
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> the copy or contrivance shall be returned to the person in whose possession it was when it was seized or, if it is not reasonably practicable to return it to that person, shall be disposed of in accordance with the law regulating the disposal of lost or unclaimed property in the hands of police authorities.

In my view the intention of the legislature in enacting s. 15(4) (b) of the Copyright Act is that after the infringing copies are seized by the police under a search warrant issued by a Magistrate proceedings for any offence under s. 15(1) must be instituted within six months of the seizure. If no proceedings are instituted within the six months the copies have to be returned to the person from whom they were seized or be dealt with in accordance with the provisions of s. 15(4) of the Copyright Act.

The second prosecution in this case cannot be a continuation of the first one. The proceedings which were instituted within six months of the seizure of the tapes terminated on 14 September 1982 when the accused was discharged. Those proceedings were thereafter dead and gone to all intents and purposes. The order of discharge of the accused by itself was no bar to the institution of further proceedings against the accused but any further proceedings had to be instituted within six months of the seizure of the tapes and these six months had already lapsed when the accused was arrested the second time. And as the second proceedings were not instituted within the aforesaid six months the Magistrate's Court had no jurisdiction to take cognizance of the offences with which the accused was charged on this second occasion. The ruling by the learned Magistrate was not a ruling on mere procedure from which there could be no right of appeal. The ruling went to the very jurisdiction of the Magistrate's Court and as such an appeal was quit in order. In the exercise of the appellate jurisdiction as well as the revisionary powers of the High Court I ordered that the accused be acquitted and discharged and that the video tapes be returned to him.

Also found at [1983] 1 CLJ 244